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FOO YAU LIM & ORS

v.

DATO' HAN JOKE KWANG & ANOR

B

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
BALIA YUSOF WAHI JCA
TENGKU MAIMUN JCA
[CIVIL APPEAL NO: W-02-2218-2012]

C

29 NOVEMBER 2013

LAND LAW: *Strata title - Management corporation - Validity of Annual General Meeting - Allegations of failure to observe provisions of Strata Titles Act 1985 - Whether plaintiff exhausted internal remedies*

D

before filing suit in court - Whether dispute to be regulated by Commissioner of Building - Whether court had limited jurisdiction in matters of dispute between proprietors

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The first respondent ('plaintiff') was the proprietor of one unit of an apartment known as Anjung Hijau Apartments ('Anjung Hijau') and the second respondent ('first defendant') was the management corporation of Anjung Hijau established under the Strata Titles Act 1985 ('the Act'). The first to the seventh appellants ('the second to the eighth defendants') were the council members of the first defendant. Dispute arose when it was alleged that there was contravention of the statutory provisions in the Act in relation to the conduct of the third Annual General Meeting ('AGM') and a suit was thus filed in the High Court. Prior to that, the plaintiff and one Liew Yeon Keong had raised complaints with the Commissioner of Building ('COB') in respect of the defendants' conduct which was alleged to be invalid and not in accordance with the Act. In the High Court, it was contended that the non-compliance with the material statutory provisions rendered the third AGM null and void. The High Court ruled in favour of the plaintiff and held, among others, that (i) the resolutions passed were improperly tabled whereby there was a contravention of the Act; and (ii) there were failures to observe the statutory requirements regarding the election of the council members. Dissatisfied, the second to the eight defendants appealed. It was argued that the dispute was to be regulated by the COB under

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the Act and that the court had limited jurisdiction in matters of dispute between proprietors. Further, it was contended that the statutory regime does not allow the proprietors to sue the council members.

Held (allowing appeal; setting aside decision of the High Court)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) The COB had informed the first defendant about the complaints received and had requested the latter to provide its feedback. The COB had also informed that a meeting would be held between the two parties to resolve the matter. However, without waiting for the meeting or for any resolution by the COB, the plaintiff had filed the originating summons. Hence, the plaintiff could not be said to have exhausted the internal remedies before coming to court and had not followed the procedure set out in the Act. (paras 25, 28 & 29)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama ('plaintif') adalah pemilik sebuah unit pangsapuri yang dikenali sebagai Anjung Hijau Apartments ('Anjung Hijau') dan responden kedua ('defendan pertama') adalah perbadanan pengurusan Anjung Hijau yang ditubuhkan di bawah Akta Hakmilik Strata 1985 ('Akta'). Perayu-perayu pertama hingga ketujuh ('defendan-defendan kedua hingga kelapan') merupakan ahli majlis defendan pertama. Pertikaian berbangkit apabila didakwa bahawa terdapat perlanggaran peruntukan statutori dalam Akta berkenaan pengendalian Mesyuarat Agung Tahunan ('AGM') ketiga dan oleh itu, satu tindakan telah difailkan di Mahkamah Tinggi. Sebelum itu, plaintif bersama-sama satu Liew Yeon Keong telah membuat aduan kepada Pesuruhjaya Bangunan ('COB') berkenaan tindakan defendan-defendan yang dituduh adalah tidak sah dan tidak mengikut Akta. Di Mahkamah Tinggi, adalah dihujahkan bahawa ketidakpatuhan peruntukan penting statutori telah menyebabkan AGM tidak sah dan terbatal. Mahkamah Tinggi memberikan penghakiman bagi pihak plaintif dan memutuskan, antara lain, bahawa (i) resolusi yang diluluskan telah dibentangkan dengan salah di mana terdapat perlanggaran Akta; dan (ii) terdapat kegagalan untuk mematuhi kehendak statutori berkenaan pemilihan ahli majlis. Tidak berpuashati, defendan-defendan kedua hingga

kelapan merayu. Dihujahkan bahawa pertikaian ini sepatutnya dikawal oleh COB di bawah Akta dan bahawa mahkamah mempunyai bidang kuasa terhad berkenaan hal pertikaian di antara pemilik-pemilik. Tambahan, dihujahkan bahawa rejim statutori tidak membenarkan pemilik-pemilik mengambil tindakan terhadap ahli majlis.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)
Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) COB telah pun memaklumkan kepada defendan pertama berkenaan aduan-aduan yang diterima dan telah meminta defendan pertama memberikan maklum balas. COB juga telah memaklumkan bahawa satu mesyuarat akan diadakan antara kedua-dua pihak dalam mencari jalan untuk menyelesaikan perkara ini. Walau bagaimanapun, tanpa menunggu untuk mesyuarat tersebut ataupun sebarang penyelesaian daripada COB, plaintif telah memfailkan saman pemula. Oleh itu, plaintif tidak boleh dikatakan telah menggunakan kesemua saluran penyelesaian dalaman sebelum memfailkan tindakan di mahkamah dan tidak mematuhi prosedur seperti yang diperuntukkan dalam Akta.

Case(s) referred to:
Perbadanan Pengurusan Menara Gurney & Ors v. Pesuruhjaya Bangunan, Majlis Perbandaran Pulau Pinang & Anor [2011] 6 CLJ 583 HC ***(refd)***

Legislation referred to:
Building and Common Property (Maintenance and Management) Act 2007, s. 41
Strata Titles Act 1985, ss. 4, 44(2), Second Schedule, paras. 4, 5(a), 7(3), 8, 9(3), 13, 14, 15, 16

For the 1st-3rd & 5th-7th appellants - Logan Sabapathy (Tan Tai Hwa & Tan Lin Choon with him); M/s Tai Hwa & Co
For the 1st respondent - Christopher Lai King Lung; M/s Chris Lai, Yap & Partners
For the 2nd respondent - Yee Fei Churn (Farrahanie Yasmin Ahmad Yusoff with him); M/s Davis & Low

[Editor's note: For the High Court judgment, please see Dato' Han Joke Kwang v. Perbadanan Pengurusan Anjung Hijau & Ors [2012] 1 LNS 1210.]

Reported by Kumitha Abd Majid

JUDGMENT

Tengku Maimun JCA:

[1] The first respondent (the plaintiff in the High Court) is the proprietor of one unit of an apartment known as Anjung Hijau Apartments at Bukit Jalil, Kuala Lumpur. The second respondent (the first defendant in the High Court) is the management corporation of Anjung Hijau established under the Strata Titles Act 1985 ('Act 318'). The first to the seventh appellants (the second to the eighth defendants in the High Court) were the council members of the second respondent purportedly elected at the third annual general meeting ('the third AGM') of the management corporation of Anjung Hijau.

[2] The management corporation of Anjung Hijau had held its adjourned first annual general meeting on 5 July 2008; the adjourned second annual general meeting on 11 October 2009 and the adjourned third annual general meeting on 9 October 2010. The dispute in this matter relates to the third AGM of the management corporation of Anjung Hijau. In this judgment, parties will hereinafter be referred to as they were in the High Court.

[3] The notice dated 5 September 2010 calling for the third AGM states the agenda for the third AGM as follows:

1. Election of Chairman for the Meeting.
2. Confirmation of Minutes of the Second Annual General Meeting.
3. To receive the Audited Financial Statements for the Year ended 30 June 2010.
4. To re-appoint Messrs Azman Ahmad & Co as the Corporation's Auditors.
5. To discuss and, if deem fit, to adopt Resolutions.
6. Any other Matters.
7. Election of Council Members.

[4] The plaintiff contended that the conduct of the third AGM by the defendants was in contravention of the statutory provisions in Act 318.

[5] On 7 June 2011, the plaintiff filed an originating summons in the High Court seeking for the following orders against the defendants:

1. Satu Deklarasi bahawa Mesyuarat Agung tahunan ke 3 tertunda yang diadakan pada 9 Oktober, 2010 adalah tidak sah, salah dan terbatal;

2. Satu Deklarasi bahawa Agenda tiga (3), lima (5) dan tujuh (7) yang cuba dibentangkan pada 9 Oktober, 2010 adalah tidak sah, salah dan terbatal;

3. Satu Deklarasi bahawa Defendan Kedua hingga Defendan Kelapan adalah ahli jawatankuasa Defendan Pertama yang tidak sah, salah dan terbatal dalam Mesyuarat Agung tahunan ke 3 tertunda yang diadakan pada 9 Oktober, 2010;

4. Satu Deklarasi bahawa segala tindakan yang dibuat, diputuskan, dilaksanakan oleh Defendan Kedua hingga Defendan Kelapan pada atau selepas 9 Oktober, 2010 adalah tindakan peribadi Defendan Kedua hingga Defendan Kelapan yang tidak sah dan terbatal, salah serta *ultra vires* kedudukan mereka dan tidak mengikat Defendan Pertama;

5. Satu Deklarasi bahawa Defendan Kedua hingga Defendan Kelapan dikehendaki menanggung segala liability, gantirugi atau kos yang timbul bersama dan berasingan, sekiranya ada kepada Defendan Pertama pada atau selepas 9 Oktober, 2010 akibat tindakan Defendan Kedua hingga Defendan Kelapan yang tidak sah dan *ultra vires* kedudukan mereka;

6. Suatu injunksi bahawa Defendan Kedua hingga Defendan Kelapan dilarang samada melalui mereka sendiri, pekerja-pekerjanya, agent atau orang lain untuk merepresentasi bahawa mereka adalah ahli jawatankuasa yang sah bagi Defendan Pertama dengan serta merta;

7. Suatu Perintah bahawa Profesor Dr Ho Ban Lee dilantik sebagai Pentadbir untuk Defendan Pertama bagi tempoh masa setahun dari tarikh Perintah ini dengan serta merta;

8. Suatu Perintah bahawa Defendan Kedua hingga Defendan Kelapan dikehendaki membayar kos atas dasar indemniti peguam-anakguam penuh kepada Plaintif secara bersama dan berasingan dalam tindakan ini dengan serta merta;

9. Suatu Perintah bahawa Defendan Kedua hingga Defendan Kelapan dikehendaki membayar segala gantirugi dan kos yang timbul dalam tindakan ini sekiranya ada kepada Plaintif dengan serta merta;

10. Suatu Perintah bahawa Defendan-Defendan dikehendaki membayar Faedah pada kadar 8% setahun dari tarikh penghakiman untuk prayer lapan (8) dan prayer Sembilan (9) di atas sehingga ke tarikh penyelesaian penuh;

11. Relif-relif selanjutnya atau lain-lain yang mana difikirkan oleh Mahkamah yang Mulia sebagai suaimanfaat.

In The High Court

[6] In the High Court, it was the case for the plaintiff that the non-compliance with the material statutory provisions with regard to the conduct of the third AGM had rendered the third AGM null and void and the purported election of the second to the eighth defendants of no effect.

[7] The main issues for consideration by the High Court pertaining to the non-compliance by the defendants of the provisions, particularly, of the Second Schedule of the Act 318 were in respect of agenda no. 3, no. 5 and no. 7 in the notice for the third AGM ie, the audited financial statement for the year ending 30 June 2010; the discussion and passing of resolutions and the election of council members respectively.

[8] In respect of the audited financial statement, the complaint of the plaintiff was that the same was not tabled at the third AGM. What was tabled was merely a summary of the audited financial statement for the year ending 30 June 2010.

[9] Making reference to paras. 7(3), (4) and (5)(a) and para. 8 of the Second Schedule of the Act 318, the High Court opined that what was envisaged by the interplay between those paragraphs must be an audited account and not a summary of the account of the management corporation.

[10] Paragraph 7 of the Second Schedule provides:

(3) The council shall prepare for each annual general meeting, proper accounts relating to all moneys of the corporation and the corporation's income and expenditure.

(4) The accounts of the corporation shall be audited annually by auditors appointed by the council.

(5) The council shall within twenty-eight days of a general meeting file with the Commissioner certified true copies of:

(a) the audited accounts of the corporation which has been presented to the general meeting.

[11] Paragraph 8(1) provides:

> (1) The corporation shall hold an annual general meeting for the consideration of accounts, election of the council and the transaction of such other business as may arise.

[12] In light of paras. 7 and 8 quoted above, the High Court held that the provisions on the audited account were not fully complied with thereby rendering the third AGM null and void.

[13] On the resolutions, the issue involved the manner in which they were tabled and passed during the third AGM. The plaintiff contended that under Act 318, residents should be given 14 days notice in advance specifying the proposed resolution prior to passing any resolution. Objections were in fact taken at the third AGM in that there was a statutory procedure to be followed before the proposed resolutions could be tabled for deliberation at the AGM. The complaint was that the second defendant who acted as the chairman at the third AGM ignored the objection and proceeded to move the resolutions where four out of the eight resolutions were passed. The plaintiff contended that those acts on the resolutions were *ultra vires* and of no effect.

[14] The High Court agreed with the plaintiff that the resolutions were improperly tabled. The High Court found that the passing of the resolutions that had not been brought before the third AGM in accordance with the dictates of the legal provisions and the subsequent dealings on those resolutions by the chairman must necessarily be null and void for being *ultra vires*, in contravention of s. 4 and s. 44(2) of the Act 318.

[15] Section 4 is the definition section where it states:

> "special resolution" means a resolution which is passed at a duly convened general meeting of a management corporation of which at least fourteen days' notice specifying the proposed resolution has been given by the management corporation or by proprietors who together are entitled to not less than one-quarter of the aggregate share units and who together constitute not less than one-quarter of the membership of the management corporation.

[16] Section 44(2) provides:

> The management corporation may by special resolution make additional by-laws, or make amendments to such additional by-laws, not inconsistent with the by-laws set out in the Third Schedule, for regulating the control, management, administration, use and enjoyment of the subdivided building or land.

[17] Insofar as the issue of election of council members is concerned, the contention of the plaintiff was that during the third AGM, there was no election of the second to the eighth defendants as council members.

[18] The High Court found that, firstly, the need for an election during an AGM was a statutory requirement. Secondly, if at all, from the minutes of the third AGM, there was no record that there was a motion to regard the nominated members as deemed elected council members of Anjung Hijau and that there was a consensus from all the proprietors to that effect. What had happened was that the defendants were nominated to stand in the election, but that was as far as the process went. The High Court found that this process could hardly be qualified as a properly run AGM and that there was a failure to comply with the requirements of paras. 13-16 of the Second Schedule of the Act 318.

[19] Paragraph 13 provides for the manner of deciding questions at general meeting; para. 14 is on proxy; para. 15 provides for the voting rights of proprietor whereas para. 16 provides for voting rights of co-proprietors.

[20] The High Court concluded that the net result of the failures to observe the statutory requirements regarding the election of the council members; the audited financial statement and the resolutions must necessarily be that the prayers relating to them must succeed and that they must be granted in terms therein. The plaintiff was thus granted the prayers sought for in the originating summons with costs of RM20,000 as costs thrown away and RM150,000 as indemnity costs to the plaintiff, to be paid by the second to the eighth defendants collectively. Against the said decision, the second to the eighth defendants appealed to the Court of Appeal.

The Appeal

[21] Before us, the issues raised by the second to the eighth defendants concern, essentially, the statutory regime covering management corporations. It was the submission of learned counsel for the second to the eighth defendants that the dispute arises in the context of a factional fight and that such dispute is to be regulated by the Commissioner of Building under Act 318 and that the court has limited jurisdiction in matters of dispute between proprietors. Learned counsel argued that the statutory regime does not allow the proprietors to sue the council members

but it is for the regulators to take action against the council members. In support of this argument, learned counsel had relied on the case of *Perbadanan Pengurusan Menara Gurney & Ors v. Pesuruhjaya Bangunan, Majlis Perbandaran Pulau Pinang & Anor* [2011] 6 CLJ 583 where, in reference to the Building and Common Property (Maintenance and Management) Act 2007 ('Act 663'), John Louis O'Hara J states:

> ... it is now my intention to address s. 41 of Act 663. Act 663 is a special and specific piece of legislation enacted by Parliament to provide for the proper maintenance and management of buildings and common property in West Malaysia and Labuan. Section 3 provides for the appointment of a Commissioner of Buildings, and s. 41 reads as follows:
>
> 41. Appeals to the State Authority
>
> Any person or body aggrieved by any act or decision of the Commissioner under this Act may, within fourteen days after having been notified of the action or decision to the State Authority (*sic*); and the decision of the State Authority shall be final and shall not be questioned in any Court.
>
> The words "Commissioner under this Act" means the "Building Commissioner appointed under Act 663". It is therefore my decision that the act or decision caught by s. 41 is any decision made by the Building Commissioner under the Act 318 or the Act 663.
>
> ...
>
> There is a plethora of case law that lays down the principle which when applied to the circumstances of this case dictate that the applicants should avail itself of the remedy under s. 41 rather than go by way of judicial review. To hold otherwise would tantamount to deliberately frustrating the clear intentions of legislature which has enacted this provision at the behest of the executive. This is not just a case of s. 41 being an alternative remedy. It is clear to me that having regard to the purpose and intent of Act 663 and the specific enactment of a provision in terms of s. 41, that Parliament intended that parties who are aggrieved by any act or decision of the Commissioner, appeal to the State Authority.

[22] Section 41 of the Act 663 is reproduced below as the section quoted above had some missing words: A

> 41. Any person or body aggrieved by any act or decision of the Commissioner under this Act may, within fourteen days after having been notified of the action or decision, appeal against that action or decision to the State Authority; and the decision of the State Authority shall be final and shall not be questioned in any court. B

[23] The plaintiff was conscious of the statutory regime concerning management corporation as evident from the letters dated 25 October 2010 (exh. P8); 2 November 2010 (exh. P7) and 20 April 2011 (exh. P6) where the plaintiff and one Liew Yeon Keong had raised complaints with the Commissioner of Building in respect of the conduct of the defendants which was alleged to be invalid and not in accordance with Act 318. C D

[24] The High Court had also acknowledged the need for the plaintiff to avail himself of the remedy as found in the statutory regime when His Lordship made the finding that the plaintiff had exhausted his internal remedies before coming to the court. E

[25] Having perused the affidavits filed in respect of the originating summons and the exhibits annexed thereto, we however find that the plaintiff had not in fact exhausted the internal remedies before coming to the court. F

[26] In a letter dated 2 November 2010 (exh. P7) to the Commissioner of Building, Liew Yeon Keong had stated, *inter alia*:

> ... I would appreciate it if the Commissioner of Building (COB) will conduct an investigation into my complaint and that of other residents and make a ruling with regards to implementation of By Laws by PPAH that are not in compliance with the Strata Titles Act. I also wish to propose that the COB direct PPAH under section 9(b) of the Second Schedule of the Strata Titles Act to convene an extraordinary general meeting to discuss and resolve all the By Laws and appoint an independent moderator (who is familiar with the pertinent statutes and legislations) to chair the EGM to ensure that the EGM is conducted properly and fairly without basis, fear or favour. G H

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[27] Indeed, para. 9(3) of the Second Schedule of the 1985 Act provides:

> Where the Commissioner is satisfied that the council has not been properly constituted, he may authorise in writing any proprietor to convene an extra-ordinary general meeting for such purposes as may be approved by the Commissioner.

[28] *Vide* a letter dated 3 May 2011, the Commissioner of Building had informed the first defendant about the complaints received by the Commissioner and had requested the first defendant to give its feedback. And in response to the request from one Ban Lee Ho for a meeting, the Commissioner of Building *vide* an email dated 13 June 2011 had stated:

> ... pihak COB akan mengadakan mesyuarat bagi kedua-dua pihak dalam mencari jalan penyelesaian. Sekiranya tiada jalan penyelesaian, pihak yang terbabit dinasihatkan agar memulakan prosiding di dalam mana-mana mahkamah yang berbidangkuasa kompeten.

[29] However, without waiting for the meeting or for any resolution by the Commissioner of Building, the plaintiff had, on 7 June 2011 filed the originating summons. Hence, it is our view that the plaintiff could not possibly be said to have exhausted the internal remedies before coming to the court. The plaintiff did not follow the procedure set out in Act 318, intended to avoid costly litigation between management corporations and owners of strata title units.

[30] In the circumstances, we allowed the appeal and set aside the order of the High Court with costs of RM100,000 here and below.